2011 IL App (5th) 090659-U

NO. 5-09-0659

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 07-CF-1152
	)	
PAUL McCOY,	)	Honorable
	)	Annette A. Eckert,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Spomer concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court had jurisdiction to rule on a motion for sentence credit for time spent in home detention filed more than 30 days after sentencing. The defendant was not required to file a motion to withdraw his guilty plea in order to challenge the court's refusal to award sentence credit for time in home detention. The court did not abuse its discretion by denying sentence credit where the defendant was free to leave his home to take care of his mother and children and go to work and church.

¶ 2 The defendant, Paul McCoy, pled guilty to two counts of aggravated criminal sexual abuse and was subsequently sentenced to five years in prison. He appeals an order denying his motion to receive credit against his sentence for time spent in home detention prior to sentencing, arguing that the circuit court failed to exercise its discretion because it did not expressly determine whether his home detention was custodial in nature. The State argues that we should dismiss the appeal because (1) we lack jurisdiction and (2) the defendant failed to comply with the motion requirements of Supreme Court Rule 604(d) (eff. July 1, 2006). We affirm.

¶ 3 On September 26, 2007, the defendant was charged with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)). The following day, he was taken into custody. Bond was set at $100,000. The defendant moved to reduce his bond.

¶ 4 On October 11, the court held a hearing on the defendant's motion to reduce bond. The defendant informed the court that his family was not able to raise sufficient funds to post bond and requested that it be lowered to $34,800. He argued that he had no prior criminal record, that he was not a flight risk, and that his family needed him to be able to go to his job to support them because his wife was a homemaker. In support of his argument that he was not a flight risk, he pointed out that he had a good job as a systems technician in St. Louis that he did not want to lose. The State argued that the defendant's bond should not be lowered because it was necessary to prevent the defendant from having any contact with the 13-year-old victim.

¶ 5 The court granted the motion to reduce bond, but it imposed two conditions: (1) the defendant was to have no contact with the victim, and (2) he was to be subject to electronic monitoring. The court explained to the defendant that he was only to leave his home to go to and from work and court appearances; however, a document entitled "conditions of bond, electronic monitoring" stated that the defendant's probation officer would set up times that the defendant would be allowed outside his "specified range" to attend work, religious services, or appointments for any court-ordered treatment. Bond was reduced to $34,800. The defendant was released on bond that evening.

¶ 6 At a January 14, 2008, status hearing, the defendant requested that the electronic monitor be removed. He argued that the restrictions placed on him were making it difficult for him to take his mother–who was undergoing treatment for cancer–to doctor appointments or to take his two children to various school activities. He pointed out that he had no previous criminal history and had not had any problems or violations while released on bond.

The State once again emphasized the need to keep the defendant from contacting the victim. Before ruling, the court asked the defendant's probation officer if he could work with the defendant to enable him to take his mother to medical appointments. The probation officer said yes. The court then denied the defendant's motion.

¶ 7 On June 3, the defendant pled guilty pursuant to a negotiated plea agreement. In exchange for the defendant's plea, the State agreed to seek a sentence capped at five years. After accepting the defendant's plea, the court moved on to consider the State's motion to revoke his bond. Two witnesses testified. The victim testified that she initiated contact with the defendant by email and he replied. The defendant testified that he never contacted her. Asked if his probation officer had ever told him he was "doing something [he wasn't] supposed to be doing," the defendant said no. He went on to state that his probation officer had allowed him to visit his mother in the hospital until she passed away. The court denied the motion to revoke, finding that the State did not prove by clear and convincing evidence that the defendant had violated the terms of his bond.

¶ 8 The court held a sentencing hearing on July 29, 2008. The court sentenced the defendant to five years on each charge, to be served concurrently. Initially, the court gave him sentence credit for the days spent in the county jail before posting bond. The court then noted, however, "[T]he statute allows the court in its discretion to give credit for time on electronic monitor." The defendant argued that he was essentially under house arrest the entire time he was subject to electronic monitoring. Defense counsel told the court that the defendant only left his home two or three times that counsel was aware of "to minister out" and once to attend his mother's funeral. The State argued that the defendant should not get sentence credit for the time spent on the electronic monitor "due to the nature of the charges." The court stated, "The court agrees with the State and in its discretion is not going to give credit for time on electronic monitoring."

¶ 9 On February 4, 2009, the defendant filed a *pro se* "motion for the awarding of time served on electronic monitoring and corrected mittimus." He alleged that he "remained in the jurisdiction and 'custody' of [the] St. Clair County Sheriff" from his September 27, 2007, arrest until he was taken into the custody of the Department of Corrections shortly after his sentencing hearing on August 8, 2008. On February 5, 2009, the court entered an order denying the defendant's motion. The court stated: "Motion denied. (See transcript of sentencing page 38 where court denied credit for time served on electronic monitoring.)" This appeal followed.

¶ 10 Before considering the merits of the defendant's contention, we must address the State's argument that we should dismiss this appeal. The State first argues that we should dismiss the appeal for a lack of jurisdiction. The State further contends that we should dismiss the appeal because the defendant did not file a motion to withdraw his guilty plea. We reject both claims.

¶ 11 The State argues that this court lacks jurisdiction to consider the defendant's appeal because the circuit court lacked jurisdiction to enter the order he is appealing. This is so, the State argues, because the defendant's motion to correct the mittimus was not timely filed within 30 days of sentencing. As the State correctly points out, a circuit court loses jurisdiction to consider a motion directed against the judgment if it is filed more than 30 days after the judgment is entered. *People v. Flowers*, 208 Ill. 2d 291, 303, 802 N.E.2d 1174, 1181 (2003); see also 730 ILCS 5/5-8-1(c) (West 2008). As the State acknowledges, however, a court does not lose jurisdiction to rule on a motion to correct the mittimus and may enter an order amending the mittimus at any time. *People v. Wright*, 337 Ill. App. 3d 759, 762, 787 N.E.2d 870, 873 (2003). The State argues that because the ruling involved in this case involves more discretion on the part of the circuit court than is typically involved in a motion to amend or correct the mittimus, this rule is not applicable. We are not

persuaded.

¶ 12 In support of this argument, the State points to language in *People v. Wright*. The court there explained, "A trial court's act of correcting a mittimus *** is a ministerial act and does not change the underlying sentence." *Wright*, 337 Ill. App. 3d at 762, 787 N.E.2d at 872-73. As we will discuss in more detail when we consider the merits of this appeal, a circuit court has discretion in determining whether to award sentence credit for time spent in home detention. Thus, the State contends, the ruling on the motion to correct the mittimus in this case was not a mere ministerial act. We believe that this argument places too much emphasis on the *Wright* court's use of the phrase "ministerial act" and overlooks the importance of the fact that an order correcting or amending a mittimus does not change the underlying sentence. See *Wright*, 337 Ill. App. 3d at 762, 787 N.E.2d at 873. As the court explained, the mittimus is merely a document providing prison officials with the details about a prisoner's sentence. *Wright*, 337 Ill. App. 3d at 762, 787 N.E.2d at 873. It is not a judgment in its own right. See *Wright*, 337 Ill. App. 3d at 762, 787 N.E.2d at 873 (citing *People v. Troesch*, 57 Ill. App. 2d 466, 468, 206 N.E.2d 468, 469 (1965)). A motion to amend the mittimus to reflect sentence credit is not directed at the judgment. The fact that the ruling on the motion in this case is not a "ministerial act" does not change this fact. We thus conclude that the circuit court had jurisdiction to rule on the motion.

¶ 13 The State next argues that we should dismiss the appeal because the defendant failed to comply with the motion requirements of Rule 604(d). That rule provides, in relevant part, that a defendant who pleads guilty pursuant to a negotiated plea agreement must file a motion to withdraw his plea if he wishes to challenge his sentence on appeal. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). This requirement applies whenever a defendant pleads guilty in exchange for some concession related to his sentence. *People v. DeRosa*, 396 Ill. App. 3d 769, 774-75, 919 N.E.2d 997, 1001 (2009). The requirement is not jurisdictional (*DeRosa*, 396 Ill. App.

3d at 777, 919 N.E.2d at 1003), but it is a precondition to an appeal challenging a sentence as excessive (*DeRosa*, 396 Ill. App. 3d at 775, 919 N.E.2d at 1002). We are not persuaded by the State's contention that the Rule 604 motion requirement acts as a precondition to an appeal that does not challenge the propriety of the underlying sentence.

¶ 14 Our decision is informed by the purpose of the motion requirement. As this court previously explained:

> "The premise underlying this requirement is that when a defendant pleads guilty in exchange for a limit on the sentence that can be imposed, allowing the defendant to challenge that sentence without withdrawing his guilty plea 'unfairly binds the State to the terms of the plea agreement while giving the defendant the opportunity to avoid or modify those terms.' " *DeRosa*, 396 Ill. App. 3d at 774, 919 N.E.2d at 1001 (quoting *People v. Linder*, 186 Ill. 2d 67, 74, 708 N.E.2d 1169, 1172-73 (1999)).

However, sentence credit for time spent in detention prior to sentencing is not "within the scope of the plea agreement." *People v. Willer*, 132 Ill. App. 3d 63, 67, 476 N.E.2d 1385, 1388 (1985). Moreover, as previously noted, had the court granted the defendant's motion, amending the mittimus would not have changed the underlying sentence.

¶ 15 Other Illinois courts have found the motion requirement of Rule 604(d) inapplicable to appeals that raise only issues of sentence credit and do not challenge the underlying sentence. *E.g.*, *People v. Green*, 375 Ill. App. 3d 1049, 1053, 874 N.E.2d 935, 939 (2007); *People v. Guerrero*, 311 Ill. App. 3d 968, 971, 725 N.E.2d 783, 785 (2000). In *People v. DeRosa*, this court found this distinction persuasive for many of the reasons we have just outlined. *DeRosa*, 396 Ill. App. 3d at 777-78, 919 N.E.2d at 1003-04. A motion requesting sentence credit does not become a motion to reduce or reconsider a defendant's sentence just because the court is called upon to exercise discretion. We find the motion requirement inapplicable to this appeal, and we will therefore consider the merits of the defendant's

contention.

¶ 16 As previously noted, whether to award sentence credit is a matter of discretion. The defendant does not argue that the court abused this discretion. Rather, he contends that the court erroneously concluded that it did not have the discretion to award sentence credit at all. We find that the record does not support this contention.

¶ 17 Pursuant to statute, a circuit court "must" give a defendant credit against his sentence for time spent in custody awaiting trial and sentencing. However, the court "may" give credit for time spent in home detention "if" the court finds that the home detention was custodial in nature. 730 ILCS 5/5-8-7(b) (West 2008). The use of the word "may" makes this a matter within the court's discretion. *People v. Witte*, 317 Ill. App. 3d 959, 965, 740 N.E.2d 834, 839 (2000). However, there are situations in which the court does not have the discretion to award credit. As previously noted, the relevant statute provides that the court may only award sentence credit for time spent in home detention *if* the court finds that the home detention was "custodial." 730 ILCS 5/5-8-7(b) (West 2008). In addition, if a defendant has been convicted of certain specified offenses, he is not eligible for sentence credit for time in home detention. 730 ILCS 5/5-8-7(d) (West 2008).

¶ 18 Here, the court did not make any express findings of fact. In denying the defendant's request for sentence credit at the sentencing hearing, the court stated only that it "agree[d] with the State." The State did not argue that the defendant's home detention was not custodial in nature; instead, the prosecutor stated that due to the nature of the charges, she would object to the defendant receiving any credit for time spent on electronic monitoring. The defendant appears to focus on the prosecutor's use of the phrase "due to the nature of the offense." He infers from this that the court assumed that the defendant's crime was one of those for which sentence credit is not available. See 730 ILCS 5/5-8-7(d) (West 2008). As the defendant correctly notes, he was not convicted of one of the enumerated offenses. We

believe that this argument reads far too much into both the prosecutor's argument and the court's statement that it agreed with the State. There is nothing in the record to suggest that the court erroneously concluded that it did not have the discretion to award sentence credit due to the specific offense charged. Indeed, the court stated twice that it did have discretion. Without more, we cannot assume the court meant anything by its comment other than it agreed with the State that the defendant should not get the sentence credit.

¶ 19 In addition, the defendant argues that once a defendant requests credit for time in home detention, the court has "an obligation to exercise its discretion and determine whether [the defendant's] home detention was custodial." We note that the defendant does not argue that the court was required to make *express* findings of fact related to whether his detention was custodial. He points to *People v. Gonzales*, 314 Ill. App. 3d 993, 734 N.E.2d 77 (2000), and argues that *Gonzales* is an example of a proper exercise of a circuit court's discretion. There, as here, the court did not make any express findings with regard to the custodial nature of the defendant's home detention. However, the court did note that the conditions of the defendant's home detention allowed him to leave the house for work 6 days a week for 11 hours a day. *Gonzales*, 314 Ill. App. 3d at 999, 734 N.E.2d at 82. On appeal, the Second District concluded that this "comment qualifie[d] as a finding that home detention was not 'custodial' under section 5-8-7(b)." *Gonzales*, 314 Ill. App. 3d at 999, 734 N.E.2d at 82. The court then held that the finding was not against the manifest weight of the evidence because the circuit court "was apprised of the restrictions imposed as conditions of [the] defendant's release." *Gonzales*, 314 Ill. App. 3d at 999, 734 N.E.2d at 82.

¶ 20 Here, the court did not make any statements that might be construed as an implicit finding that the defendant's home detention was noncustodial. We find this to be a distinction without a difference. As in *Gonzales*, the court here was well aware of the restrictions imposed on the defendant as well as the reason for those restrictions. The court

was aware that the defendant was able to go to work. (We note that the defendant was working when he was initially released on bond but was unemployed by the time he was sentenced, and the record does not reveal when he lost his job.) The court was also aware that the defendant was able to leave his home as needed to care for his ailing mother, take his children to activities, and attend his mother's funeral. In fact, the court specifically directed the defendant's probation officer to allow the defendant to do these things while on home detention. This case involved the sexual molestation of the 13-year-old daughter of the defendant's acquaintance. The factual basis presented at the defendant's guilty plea hearing included an allegation that the victim's mother discovered the abuse after her daughter began showing signs of psychological distress. The restrictions imposed on the defendant when he was released on bond were geared towards preventing him from having any contact with the victim. The record shows that the court and the probation officer worked with the defendant to restrict his activities to the extent necessary to protect the victim without adversely impacting his ability to care for his mother and children, make a living, or be involved in religious activities. The court easily could find that the defendant's home detention was not custodial based on these facts.

¶ 21 Moreover, as we read the statute, even assuming the court finds home detention to be custodial in nature, it still has discretion to decide not to award credit. The statute reads, in relevant part, "the trial court may give credit to the defendant for time spent in home detention *** if the court finds that the detention *** was custodial." 730 ILCS 5/5-8-7(b) (West 2008). It does not say the trial court *must* give the credit if it finds that home detention was custodial. See *Witte*, 317 Ill. App. 3d at 965, 740 N.E.2d at 839 (stating that the award of sentence credit for home detention is discretionary); but see *Gonzales*, 314 Ill. App. 3d at 998-99, 734 N.E.2d at 82 (explaining that "the trial court may nevertheless deny his request for credit if the home detention was not custodial"). As Illinois courts have long recognized,

home detention is inherently less restrictive than detention in a prison. A defendant subject to home detention enjoys far greater privacy than he would if he were incarcerated, and he is "not subject to the regimentation of a penal institution." *Gonzales*, 314 Ill. App. 3d at 995-96, 734 N.E.2d at 80. In addition, at least while he is inside his home, his activities are not restricted. *Gonzales*, 314 Ill. App. 3d at 996, 734 N.E.2d at 80. Given the inherently less restrictive nature of home detention and the express language of the statute, we conclude that awarding credit is a matter within the court's discretion even without a finding (express or otherwise) that home detention was not custodial. In light of this discretion and the court's obvious efforts to balance the defendant's needs against the need to protect the victim, we find no abuse of discretion.

¶ 22 For the foregoing reasons, we affirm the circuit court's order denying the defendant's request for sentence credit.

¶ 23 Affirmed.